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IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No. 694

ISAAC TRAININ,

Petitioner,

against

DAVID E. CAIN, Commanding Officer of Camp Upton.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

OSMOND K. FRAENKEL,
Attorney for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Isaac Trainin, respectfully represents and petitions for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit as follows:

Summary Statement

Petitioner seeks to review a judgment of the United States Circuit Court of Appeals affirming the judgment of the District Court for the Eastern District of New York quashing a writ of habeas corpus (147). The writ was issued to challenge petitioner's induction into the army under the Selective Training and Service Act of 1940. Petitioner had claimed exemption from military service

under this Act on the ground that he was both a regular and a duly ordained minister of religion, a claim originally accepted by his Local Draft Board (3). The Board then reconsidered its reclassification and classified petitioner as subject to military service (3). The habeas corpus proceedings were instituted after petitioner had submitted to induction in the army, following his exhaustion of the administrative remedies provided for by law (4).

It must be borne in mind that this is not the usual case in which the registrant has the burden of proving his right to an exemption. For that exemption was granted him by his Draft Board—indeed, twice granted (see 66). Further consideration of his status by that Board was, under the regulations, permitted only on the basis of "facts not considered when the registrant was classified" (626.2).* We submit that no such facts were adduced before the Board. Consequently it had no right to change petitioner's classification.

Petitioner claimed in his affidavit, submitted in support of the habeas corpus proceedings, that he had been ordained toward the end of 1939 by his father and in May, 1940 by two other rabbis, that he functioned as the rabbi of the Congregation Tifereth Zion Anshe Sfard at 2371 84th Street, Brooklyn, even before he had been formally ordained as rabbi and that he continued to function after he had been ordained (6). Petitioner called attention to the fact that under Hebrew law one rabbi might ordain another and that his qualifications as a rabbi had been vouched for by two organizations of Hebrew rabbis, whose statements on his behalf were annexed to the habeas corpus petition as Exhibits "A" and "B" (7, 8).

One of these statements certified that petitioner had been a member of the Assembly of Hebrew Orthodox Rabbis of America and Canada for several years past and that he had been found qualified to be a rabbi (10); that any conclusion that he was not a rabbi "is at variance with the

* The full text of the regulation is printed *infra* at page 16.

facts and reality" (11). The other paper was signed by the Federation of Orthodox Rabbis of America and certified that petitioner was a rabbi and the spiritual leader of his congregation (12).

Petitioner's contention in his application for the writ of habeas corpus was that the classification made by the Draft Board was contrary to law, without support in the evidence and arbitrary (4, 8).

The return to the writ was purely formal (13); the traverse to the writ realleged the matters set forth in the original application (14).

Thereafter a hearing was held on three separate days before Judge Inch. At the hearing before Judge Inch the Draft Board file was placed in evidence and summarized by one of its members (15-23). This showed that petitioner had claimed exemption as a rabbi of the Hebrew Orthodox faith in the questionnaire filed by him in July, 1941 (15, 24) and that the Assembly of Hebrew Orthodox Rabbis had certified on August 1, 1941, that petitioner was a rabbi (36).

It appeared, moreover, that the Draft Board asked one Moses Elihu Leiter, himself a rabbi, to make an inquiry with regard to petitioner's qualifications as a rabbi (16). Rabbi Leiter wrote the Draft Board on September 4, 1941, stating, among other things,

> "In accordance with Rabbinic law, an individual may be fully ordained by another individual rabbi and thus be qualified as a rabbi in Israel. That is the case of Rabbi Isaac Nathan Trainin whose documents show that he was duly ordained by the Rabbis Jacob Mendelsohn of Newark, New Jersey, and Alexander Levine of Brooklyn" (38).

Subsequently the Board classified petitioner as exempt (16).

Several months later the Draft Board received communications questioning petitioner's right to exemption (16, 17). In checking this information one of the members of

the Board interviewed petitioner and also the president of the congregation, as the result of which the Draft Board continued petitioner's exempt status (65, 66).

The question of petitioner's status apparently came up again as the result of an inquiry made to the Draft Board by the Character Committee appointed by the Appellate Division of the Supreme Court of the State of New York before whom petitioner had appeared for admission to the bar (17, 35). That petitioner had been studying law was disclosed in his original questionnaire (7).

Following this inquiry the Draft Board did not call petitioner before it (36), nor did it call any other person who might have had information (28). Instead it sent petitioner's file to Selective Service headquarters in New York City (17). Headquarters turned the matter over to a panel which it had set up for advice on religious matters (17, 56). This panel was not provided for in any general regulations, nor had Col. McDermott, head of the New York City Selective Service, promulgated any regulations with regard to such a panel (59).

The competency of the panel which sat in this case is open to serious question. Petitioner claimed to be a rabbi of the Orthodox Hebrew faith (36). Petitioner appeared before five members of the panel, no one of whom was a member of that faith. Only two of the five persons were rabbis, Rabbi Herbert Goldstein and Rabbi Israel Leventhal. They are graduates of the Conservative Seminary (89) and are rabbis with whom the Orthodox Hebrew rabbis have had controversies (90). The one group is Hebrew Orthodox, the other Modern Orthodox (88). Rabbi Goldstein did not claim that he was a Hebrew Orthodox rabbi. On the contrary, he indicated that he had been head of the English Orthodox rabbis (96, 108). This itself accounts for some of the atmosphere of the case and for the animus which pervades Rabbi Goldstein's testimony (see particularly 103-106). It is obvious that Rabbi Goldstein, himself a graduate of a seminary and a teacher at a seminary,

was prejudiced against rabbis who were not seminary graduates. He had a predisposition to suspect as not properly qualified anyone who did not hold a certificate from a seminary (108-110). Exemption of ministers is, however, not conditioned upon their being seminary graduates, although exemption of students is conditioned upon their being students at recognized seminaries.

Petitioner appeared before these members of the panel on November 17, 1943. The panel inquired into the ordination certificates produced by petitioner (126, 127), particularly with regard to the presence on these papers of certain particular words (128). Petitioner stated that no particular form of words was required (128). The panel also inquired into petitioner's residence, marriage and education (128-130) and the functions he had performed as rabbi (130-133). The panel questioned petitioner with regard to his attendance at law school and the work performed while acting as a clerk and his intentions with regard to the practice of law (133-135) and with regard to the financial situation of petitioner's congregation (136, 137). Finally, petitioner was questioned with regard to matters of rabbinical knowledge (138-140).

The panel gave to the Draft Board no expert opinion of any kind, but instead merely reported a recommendation that petitioner be not exempted (17, 31).* The Draft Board on the basis of this recommendation and without communicating with petitioner (36) changed its original determination that petitioner was exempt (18). After petitioner demanded a hearing he was seen by a single member of the Board, Mr. Goldman (18). On that occasion his qualifications as a rabbi were attested to by five other rabbis in person, one of whom was his father (28), and petitioner submitted to the Board two contracts with his congrega-

* The panel did, it is true, make a notation of its reasons for declaring that petitioner should not be exempted (21). This so-called "confidential memorandum" was not communicated to the Draft Board at the time, nor until many months after the Draft Board had reclassified petitioner (32).

tion (47), one of which had been entered into in August, 1941, for a three-year term (6). The Draft Board immediately adhered to the reclassification which had been made a few weeks before (18). Petitioner then vainly appealed to the Appeals Board, although he was supported in this appeal by the two rabbinical organizations already referred to (62-63).

The only member of the Draft Board who testified before Judge Inch was Mr. Goldman. He admitted that petitioner had claimed exemption because he had been functioning as a rabbi (24-25) and that the only thing which the Local Board had done to ascertain whether or not that claim was true was to send the file to headquarters (26). Headquarters apparently made an investigation which is embodied in reports dated November 17th and 23rd, 1943 (28, 29, 31). These reports were not seen by the Local Board until March 20, 1944 (21, 22), on the eve of petitioner's induction on March 22nd (20). They played no part in the Board's reclassification of petitioner (29, 31) or in the determination of the Appeals Board (61, 62). Nevertheless, these reports were considered by the Trial Court and motions twice made to expunge them from the record were denied (31, 32, 62). This action was justified by the Circuit Court of Appeals and forms the basis of one of the points on which review is sought by this Court. The details will be discussed more fully hereafter.

Mr. Goldman admitted that petitioner had also claimed exemption as a duly ordained rabbi and that the five rabbis who attended with him in December supported his claim (34), as had two organizations of Orthodox rabbis (36, 37). The Local Board did nothing to investigate this claim other than to rely on the decision of the panel and the minutes of the panel.

Petitioner, at the hearing before Judge Inch, sought to ascertain on what grounds the Draft Board had rescinded its original exemption. At first Mr. Goldman suggested that it was because petitioner was "more inclined to follow

the law than to establish himself as a rabbi" (42). Then he made some aspersions on the method by which petitioner had been ordained. Mr. Goldman admitted, however, that the Board had made no investigation in order to determine whether under Hebrew law one rabbi had the power to ordain another, and he admitted that all of the rabbis who had appeared before him had stated that a single rabbi could ordain another (43). Mr. Goldman was unable to indicate anything in the record to justify a contrary conclusion (44).

Mr. Goldman then shifted his ground and sought to sustain the Board's action by contending that the certificates of ordination were not in proper form (45). When asked to indicate what evidence there was in the record to show that any particular form of words was necessary, he referred merely to certain questions which had been asked by one of the members of the panel (46). These questions, however, did not constitute any evidence as to the necessity for the existence of any such words (see 128). At the hearing before Judge Inch it was conclusively shown that under Hebrew law no particular words were necessary (see *infra*, p. 29).

Mr. Goldman admitted that no attempt had been made by the Local Board to determine whether or not petitioner was actually functioning as a rabbi of the congregation, although it was located within a mile of the Local Board's office (47, 48). Nor did the Board make any attempt to communicate with any member of the congregation or with the organizations which sponsored petitioner (28, 47, 48).

Testimony was also given on behalf of respondent by Col. Durham, Chief of the Legal Division of Selective Service Headquarters of New York City. He merely testified as to how the panel came to be organized (55, 56) but made it clear that neither the law nor any regulations dealt with the establishment of such a panel (59). A member of the Appeals Board testified but added nothing to the testimony of other witnesses (60-65).

Respondent also called Rabbi Goldstein, one of the members of the panel, who testified at length, both with regard to what occurred before the panel and with regard to his own personal opinions (96-112). He admitted that under Hebrew law one rabbi could ordain another (101). He admitted also that under Hebrew law no particular form of words was required in the certificate of ordination (101).* With his testimony as a whole we will deal further hereafter.

One of the rabbis who had ordained petitioner, Rabbi Levine, had appeared before Mr. Goldman and also testified before Judge Inch. He stated that he had examined petitioner and concluded that he was qualified to be a rabbi and that he had so told Mr. Goldman (115, 116). Rabbi David Savitz, for seventeen years the rabbi of the Jewish Community Center of Hunts Point, New York, testified to the same effect (86-88). So did Rabbi Gartenhaus, President of the Federation for Hebrew Orthodox Rabbis (113, 114). That petitioner's certificates of ordination were in proper form was also attested by Rabbi Isidore Dushowitz, one of the Chairmen of the Rabbinical Board of Greater New York (94, 95). Both Rabbis Savitz and Gartenhaus testified that there was no possible basis in Hebrew law for any finding that petitioner's certificates were not proper (86, 114).

In addition to the foregoing, petitioner and his father testified with regard to petitioner's studies and activities as a rabbi (67-72, 118-124).

In his opinion quashing the writ (149-155) Judge Inch concluded that he had no power to set aside the Draft Board's decision because it had heard petitioner fully. He said also:

> "That there has been a sharp and apparently sincere controversy here over a religious issue is apparent,

* When asked whether Jewish law prescribed any particular form of words he said: "No, except custom. * * * I mean the custom of the Orthodox Theological Seminaries, and as a rule the individual rabbis" (101).

but the Court does not feel that it is necessary nor its duty to take sides in such controversy" (154).

The Court did not in its opinion indicate what this controversy was and that ground of the Trial Court's decision was apparently abandoned in the Circuit Court of Appeals.

Opinion Below

The opinion of the Circuit Court of Appeals has not yet been officially reported.* The basis of the decision was that the action of the Draft Board would not be reviewed by the Court if there was any evidence to support such action. Judge Clark expressly rejected the rule followed in the Fourth, Sixth, Seventh and Eighth Circuits that there must be substantial evidence to support a Draft Board's finding. Judge Clark also took the view that under the Selective Service regulations a person had to be both an ordained and a practicing minister in order to be entitled to exemption, although no such contention had been made by anybody at the hearing below or on the appeal. Judge Clark reached the conclusion that there was "ample justification" for the Board's action in holding that petitioner was not a regular rabbi. He recognized that the question was more difficult as to whether petitioner was duly ordained. The opinion contained many statements not supported by the record which formed the basis of an application for rehearing (193-204).

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judiciary Code, as amended. The judgment of the Circuit Court of Appeals was entered on August 15, 1944. Timely application for rehearing was made, which was denied on September 11, 1944 (205).

* It is found at pages 180-190 of the record.

Questions Presented

1. Whether in review of the action of a Draft Board in habeas corpus proceedings the Court must sustain the action taken by the Board if there is any evidence to support that action, or whether the Court must inquire whether there is substantial evidence, and, in the absence of such substantial evidence, set aside the determination made by the Board.

2. Whether under the Selective Service and Training Act of 1940 a person is entitled to exemption who is a duly ordained minister of religion, whether or not he is also a regular minister.

3. Whether there was any evidence or any substantial evidence justifying the action of the Draft Board in this case in rescinding the exempt classification originally given to petitioner and denying him the continuation of such exempt status.

4. Whether the decision of a Draft Board can be sustained where it appears in large part to have been based on considerations irrelevant to the issue which the Board was required to decide.

5. Whether a Draft Board can abdicate its function to an unofficial panel and submit to that panel the question which the Draft Board itself must determine, where the registrant is not advised of the views expressed by the panel and is given no opportunity to controvert them.

6. Whether a Draft Board's decision can be sustained on the basis of evidence which was not considered by the Draft Board in reaching the determination sought to be reviewed.

Reasons Relied on for the Allowance of the Writ

1. The Circuit Court of Appeals for the Second Circuit has decided an important question of Federal law at variance with decisions of other circuits and in conflict with the trend of decision in this Court. The Circuit Court of Appeals in its opinion expressly rejected the rule adopted in numerous other circuits that a Draft Board decision is reviewable if there is no substantial evidence in its support. See *Rase* v. *United States*, 6 Cir., 129 F. 2d 204, 207; *Graf* v. *Mallon*, 8 Cir., 138 F. 2d 230, 234-235; *Johnson* v. *United States*, 8 Cir., 126 F. 2d 242; *Benesch* v. *Underwood*, 6 Cir., 132 F. 2d 430, 431; *Seele* v. *United States*, 133 F. 2d 1015, 1021; *United States* v. *Messersmith*, 7 Cir., 138 F. 2d 599; *Arbitman* v. *Woodside*, 4 Cir., 258 F. 441. This Court has uniformly adopted the substantial evidence rule. See *Florida* v. *United States*, 292 U. S. 1, 12; *Helvering* v. *Rankin*, 295 U. S. 123, 131; *Acker* v. *United States*, 298 U. S. 426, 431; *Washington V. & M. Coach Co.* v. *N. L. R. B.*, 301 U. S. 142, 147; *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 229. It means more than "any" evidence; see *Gunning* v. *Cooley*, 281 U. S. 90, 94; *Penn. R. Co.* v. *Chamberlain*, 288 U. S. 333, 343; *Consolidated Edison Co.* v. *N. R. L. B.*, supra.

2. The Circuit Court of Appeals has decided an important question of Federal law which has never heretofore been decided by this Court and which should be decided. The Selective Service and Training Act of 1940 in Section 5, subdivision "d", provides for exemption of "regular or duly ordained ministers of religion". The Circuit Court has interpreted this provision of law to prevent exemption of a duly ordained minister unless he be also a regular minister. It based this determination on the regulations issued under the statute. These regulations, Section 622.44,*

* Printed in full at pages 15, 16, *infra*.

define a regular minister as a person who customarily performs the duties of such minister, although not ordained, and define an ordained minister as one who customarily performs the duties, but is ordained. The Circuit Court, having upheld the validity of the regulations and in effect denied any separate exemption to ordained ministers, the reference to these in the statute might as well not have been made. This question has never been heretofore passed on by any court.

3. The Draft Board acted contrary to the regulations (626.2)* in reconsidering petitioner's classification without having any new facts before it. The action of the Board was "in the teeth of all the substantial evidence" and cannot stand. *United States ex rel. Rubin* v. *Magruder*, 55 F. Supp. 947. In holding that the action of the Draft Board was justified by the evidence before it, the Circuit Court, as we shall show in the accompanying brief, disregarded essential aspects of the record and stated as facts matters which do not appear in the record. The most serious of these is the Court's statement that "certain rabbis assert" that particular words were essential in certificates of ordination. No rabbi made any such assertion before the Local Board; the evidence before the Court was conclusive to the contrary. Justice requires scrutiny of the facts by this Court.

4. Since the Draft Board made no finding as to the reasons for its action, it is impossible to determine whether it acted in accordance with the law or whether it based its conclusion largely on matters irrelevant to the issue, such as petitioner's completion of his legal studies and petitioner's alleged ignorance on certain rabbinical matters. At the very least the petitioner was entitled to have the Board indicate the reasons for its action and no determination made on this record should be allowed to stand in the absence of such a determination by the Board. See *United States ex rel. Reel* v. *Batt*, 141 F. 2nd 845; *United States*

* The full text is printed on page 16, *infra*.

ex rel. Kornfeld v. *Cain*, not yet reported, decided September 7, 1944, by Judge Abruzzo in the Eastern District of New York.

5. The Draft Board in effect abdicated its function by submitting to a panel the very question which the Draft Board was called upon to consider. A panel set up for the purpose of expressing opinions on technical matters was used for a purpose not intended or authorized. It was improper for the Board to act on the panel's recommendation without it or petitioner having any knowledge of the panel's reasons and without the Board giving petitioner an opportunity to present evidence to show that the panel's reasons had no basis in fact.

This question affects the functioning of the Draft Law primarily in New York City, but it might also affect it in other parts of the country if the same panel system has been used elsewhere or should come into use. Already several cases, in addition to the case at bar, have arisen in which panel decisions have been questioned: *United States ex rel. Rubin* v. *Magruder*, 55 F. Supp. 947; *United States ex rel. Levy* v. *Cain*, 55 Supp. 956; *United States ex rel. Kornfeld* v. *Cain*, Eastern District New York, decided September 7, 1944. Other cases are no doubt pending (see New York Herald-Tribune, October 27, 1944, p. 15, for the account of one such case). It is important, therefore, that this Court clarify the right of the Draft Board to use such a panel and the manner in which it can be used.

6. The Circuit Court sustained the receipt in evidence by the Trial Court of certain documents which were not before the Draft Board and itself used these documents in support of its conclusions. It is submitted that no administrative decision can be supported on the basis of material which was not before the administrative agency and which the person affected had no opportunity to meet. See *Morgan* v. *United States*, 304 U. S. 1; *Newbrand* v.

City of Yonkers, 285 N. Y. 164. Moreover, these documents were received by the Draft Board after petitioner had been ordered to report for induction. Under the regulations (626.2) the Board could give no further consideration to petitioner's status at that time.

WHEREFORE petitioner prays that a writ of certiorari issue out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court for review and determination, as provided by law, this cause and a complete transcript of the record and of all proceedings had therein, and that the order of the United States Circuit Court of Appeals affirming the dismissal of the writ of habeas corpus in this case may be reversed, and that petitioner have such other and further relief in the premises as this Court may deem proper.

Dated, November 15, 1944.

OSMOND K. FRAENKEL,
Counsel for Petitioner.

I hereby certify that I have examined the foregoing petition for a writ of certiorari and that in my opinion it is well founded and the cause is one in which the petition should be granted.

OSMOND K. FRAENKEL,
Counsel for Petitioner.

BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

1. Jurisdiction

The facts with regard to jurisdiction have been set forth in the foregoing petition.

2. Statute and Regulations Which Are Involved Herein

The Selective Training and Service Act of 1940 provides in Section 5, subdivision (d), as follows:

> "Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act."

The regulations issued under this provision provide as follows:

> "622.44 Class IV-D: Minister of religion or divinity student.
>
> (a) In Class IV-D shall be placed any registrant:
>
> (1) Who is a regular minister of religion, or
>
> (2) Who is a duly ordained minister of religion.
>
> (b) A 'regular minister of religion' is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister.
>
> (c) A 'duly ordained minister of religion' is a man who has been ordained in accordance with the cere-

monial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties."

"626.2 *When registrant's classification may be reopened and considered anew.* (a) The Local Board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any interested party in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (Form 150) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

(b) At any time before the induction of a registrant, the Local Board shall reopen and consider anew such registrant's classification upon the written request of the State Director of Selective Service or the Director of Selective Service."

3. Statement of the Case

The basic facts have been stated in the foregoing petition. Certain other facts will be called to the attention of the Court, particularly in the point discussing the evidence before the Draft Board.

4. Summary of Argument

a. The Circuit Court of Appeals erred in holding that the action of the Draft Board could be sustained although not supported by substantial evidence.

b. The Circuit Court of Appeals erred in holding that a duly ordained minister is not entitled to exemption unless he is also a regularly functioning minister.

c. The Circuit Court of Appeals erred in holding that there was evidence before the Draft Board to justify a denial of petitioner's claim for exemption.

d. The Draft Board improperly abdicated its function to a panel not vested with any authority by law.

e. The decision of the Draft Board was improperly sustained on the basis of material which was not before the Draft Board at the time it reclassified petitioner.

5. Argument

POINT I

The Circuit Court of Appeals erred in holding that the action of the Draft Board could be sustained although not supported by substantial evidence.

This case marks a new stage in the relinquishment to the executive of the judiciary's traditional concern with the facts, as well as the law, of controversy. The course of that relinquishment has, heretofore, been limited by a measure of judicial supervision over the facts, here abandoned by the Circuit Court, a supervision which finds expression in the substantial evidence rule. This Court has found it wise so to interpret the congressional mandate that the factual decisions of various expert administrative

bodies should be final. It has reached that conclusion in situations involving property rights alone, where the person affected was represented by counsel, where there was a hearing at which witnesses were subject to cross-examination, where the fact-finding body was expert and where it was required to formulate its conclusion with precision. The rule has been applied to findings of the Interstate Commerce Commission, *Interstate Commerce Commission* v. *Union Pacific Railroad Company*, 222 U. S. 541, *Florida* v. *United States*, 292 U. S. 1, of the Board of Tax Appeals, *Helvering* v. *Rankin*, 295 U. S. 123, of the Secretary of Agriculture, *Acker* v. *United States*, 298 U. S. 426, of the National Labor Relations Board, *Consolidated Edison Company* v. *National Labor Relations Board*, 305 U. S. 197, and of the Federal Trade Commission, see *Federal Trade Commission* v. *Reladam Co.*, 316 U. S. 149.

The rule has been defined by former Chief Justice Hughes: "Substantial evidence is more than a mere scintilla. It means such relevant evidence that a reasonable mind might accept as adequate to support a conclusion" (*Consolidated Edison Company* v. *National Labor Relations Board*, *supra*), and by the present Chief Justice: "It must do more than create a suspicion of the existence of the fact to be established" (*National Labor Relations Board* v. *Columbian E. & S. Co.*, 306 U. S. 292).

There is nothing in any of the opinions of this Court to suggest that the substantial evidence rule is to be applied in review of one kind of administrative decision and to be ignored in review of a different kind. There is no basis in these opinions for reaching a conclusion that the substantial evidence rule should not be applied in cases arising under the Selective Training and Service Act. Indeed, one would suppose the rule to be particularly applicable to these cases, cases involving not the great corporations whose names figure in some of those just cited, but persons of humble condition, cases involving not merely dollars and cents, but liberty, perhaps life itself. One would sup-

pose this all the more since in these draft cases the individual affected is denied the right to representation by counsel and is given no hearing in the traditional sense, since in these cases the tribunal which passes on his fate is not an expert one and is not required in any way to formulate the grounds of its conclusions. And, with the exception of the case at bar, all the circuit courts before whom the issue has arisen have taken this for granted.

The rule has been so stated in the Fourth, Sixth, Seventh and Eighth Circuits in cases cited on page 11, supra. Perhaps the best formulation is that contained in *Johnson* v. *United States*, 126 F. 2d 242 at 247, where the Court said:

> "No such board can bind a registrant by an arbitrary classification against all of the substantial information before it as to his proper classification. • • • A classification made in the teeth of all the substantial evidence before such agency is not honest but arbitrary. Courts can prevent the arbitrary action of such agencies from being effective."

This rule was recently followed by Judge Hartigan in the District Court of Rhode Island in *United States ex rel. Rubin* v. *Magruder*, 55 F. Supp. 947. He there set aside the withdrawal of exemption of an Orthodox Jewish student of religion based on the action of the same panel on theological matters as is involved in the case at bar. Judge Hartigan held that since the substantial evidence showed that the registrant was entitled to exemption, the Board's change of classification was arbitrary and could not be allowed to stand.

The Circuit Court in the case at bar advanced two reasons for refusing to follow the other circuits. It believed that the informal character of Draft Board proceedings required this result; it thought the substantial evidence rule not applicable to deportation proceedings which it deemed analogous (185-188). The first ground is shockingly unjust; the second proceeds on a misconception of the law.

The notion that the informality of the Draft Board proceedings permits a relaxation of judicial safeguards lacks all equity. The powerful corporation, represented by eminent counsel, having the right of cross-examining witnesses, is finally afforded judicial scrutiny of the evidence heard by an expert tribunal in order to make sure that that corporation will not be required to pay out its money unless there be substantial evidence which supports the administrative decision. But the poor draftee, deprived of assistance of counsel, confronted by no witnesses, judged by a tribunal without expert qualifications, is denied this judicial scrutiny, although he may lose his life in consequence. And this denial is here justified by the very handicaps he labors under before he becomes entitled to judicial relief! Such a result smacks of the maxim, "To him that hath shall be given, from him that hath not shall be taken away". That maxim may be a truthful reflection of what happens in a harsh world. It has no place in the thinking of an American judge. No. The handicaps under which a person labors because of the informality of the Draft Board procedure require more, not less, judicial protection.

The notion that the substantial evidence rule should not be applied to draft cases because it is not applied in deportation proceedings rests on two errors. In the first place, there is no analogy between the two kinds of proceedings, since a person served with a deportation warrant has the right to representation by counsel, is afforded a real hearing, and is finally judged by an expert body. In the second place, there is no foundation for the belief that the substantial evidence rule does not govern deportation cases. This Court has never so decided, although it is true that the term "substantial evidence" is not found in the early cases.

The Circuit Court (188) cited five deportation cases decided by this Court in support of its conclusion: *Chin Yow* v. *United States*, 208 U. S. 8; *Tang Tun* v. *Edsell*, 223 U. S. 673; *Nishimura Ekiu* v. *United States*, 142 U. S. 651;

United States v. *Ju Toy*, 198 U. S. 253; *Tisi* v. *Tod*, 264 U. S. 131; *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103. It is significant that all of these cases were decided before the substantial evidence rule had become firmly established in the law. However, in the *Vajtauer* case the present Chief Justice implied that this rule (which had been foreshadowed in the *Union Pacific* case, *supra*) was applicable in deportation as well as other cases, for he rejected one item of evidence as having no "substantial" bearing on the issue there involved. The Circuit Court also cited *Silberschein* v. *United States*, 266 U. S. 221, a case arising under the War Risk Insurance Act. That case, however, does not discuss this subject at all and was likewise decided during the period when the substantial evidence rule was in process of formulation.

The Circuit Court (188) further cited *Bridges* v. *Wixon*, decided by the Ninth Circuit on June 26, 1944, and not yet reported, and other deportation cases there cited, as support for the proposition that the administrative finding would be upheld if there was any evidence to support it. In a decision denying an application for rehearing that Court, however, repudiated the notion that the administrative decision could be sustained if supported by a mere scintilla of evidence. While the term "substantial" evidence was not used in the opinion, it is fair to infer that the Court meant to imply that substantial evidence was necessary.

Surely there is no room for the making of nice distinctions between "scintilla", "any" or "some". The notion that a finding, whether of a judge, jury or administrative agency, can be supported by evidence which is lacking in substance has no place in our law. The evidence must be such as to satisfy the reason; it must be substance, not shadow. So this Court has repeatedly held. Surely the divergence from the general rule which has occurred in the case at bar requires full consideration by this Court.

POINT II

The Circuit Court of Appeals erred in holding that a duly ordained minister is not entitled to exemption unless he is also a regularly functioning minister.

Petitioner claimed that he was both a regular and a duly ordained minister (6) and that he was entitled to exemption if he was either one or the other (7). The statute in express terms creates two categories of exemption: "Regular or duly ordained ministers of religion" are declared exempt.

The Circuit Court of Appeals has in effect stricken the words "duly ordained" from the statute. For it has held that ordination alone does not confer exemption. It bases this conclusion on the regulations which were issued under the Act (622.44, *supra* p. 15). These regulations also in effect eliminate the exemption based on ordainment. For a regular minister is defined to be a person who customarily preaches and teaches the principles of a recognized sect, although not formally ordained, so long as he is recognized by such sect. The definition of ordained ministers is identical except that it substitutes ordainment for recognition by the sect. Obviously, however, ordainment *per se* constitutes recognition by the sect, so that an ordained minister fully comes within the definition of a regular minister contained in the regulations.

In the case at bar there has never been any question about the fact that petitioner was recognized by his sect. A certificate to that effect was filed with the Draft Board on August 1, 1941 (23, 36). Additional certificates were filed with the Appeals Board somewhat later (9-12). Petitioner was supported in his claim to exemption by five rabbis of his sect who appeared before the Draft Board and none others appeared (18, 28, 34, 43, 48). If, therefore, the view taken by the Circuit Court be the correct one, the only other issue which should have concerned anyone in the case was whether or not petitioner was actually

functioning as a rabbi. In view of the conceded fact that he was vouched for by his sect, the question of his ordination would have been wholly immaterial.

Yet the greater part of the proceedings both before the Draft Board and the Court were concerned with the fact of ordination. It was this fact with which Rabbi Leiter was concerned in the fall of 1941, for he expressly said that since petitioner was ordained "his particular standing with Congregation Tifereth Zion Anshe Sfard is of no consequence in this matter" (38). Following this certification that petitioner had been duly ordained, the Draft Board granted petitioner an exempt status (16). The panel gave considerable attention to relator's ordination (126-128, 139, 140). It was, indeed, its chief concern* (106, 107). The only matter with which Mr. Goldman of the Draft Board concerned himself at the hearing in December, 1943, was the question of ordination (28, 34, 43, 72, 87, 89, 114, 116). It is particularly significant that the question of petitioner's activities as a rabbi was not brought up for discussion at all on that occasion (89, 116).

Likewise, at the hearing before the Court a great deal of the evidence was concerned with this question of ordination (34-47, 81-88, 94, 95, 97, 98, 108-117). Both at the Trial Court and in the Circuit Court of Appeals petitioner took the position in argument and briefs that he was entitled to exemption if he was an ordained minister without regard to the performance of functions, while, of course, also claiming that he had in fact performed such functions. This basic contention was not disputed by the respondent either in argument or briefs. It is evident from the foregoing that until the decision of the Circuit Court it was never supposed by anyone that if petitioner established his ordination he would not be entitled to exemption.

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* Rabbi Goldstein clearly intimated that he was not at all concerned with the functions which petitioner performed, for he said: "Unfortunately there are many people who do that, who are not ordained rabbis" (107).

The Circuit Court of Appeals (189) in support of its conclusion suggested that Congress exempted ministers because of the need of the public for spiritual guidance. There is nothing on which to rest such a supposition. Had Congress been concerned merely with the necessity for supplying congregations with spiritual leaders, there would have been no need for exempting all ministers. That necessity would have been satisfied by placing on the Draft Board responsibility for determining to what extent ministers were needed in particular places and giving only those occupational deferment. It is rather to be supposed that Congress granted exemption because it believed it incompatible with the character of an ordained minister that he should be required to perform military service.

Is it to be supposed that an ordained minister of religion would be denied exemption because he happened to be unemployed? We submit that the question of the functions performed by the minister have no bearing at all on his right to exemption. They would become relevant only if a contention were made that a minister ordinarily entitled to exemption had lost that exemption because, by reason of his activities in other directions, he had in effect abandoned the ministry. No such contention was or could have been made in this case.

The Circuit Court cited *In re Rogers*, 47 F. Supp. 265, and *Ex Parte Stewart*, 47 F. Supp. 415, as cases that followed the regulations. However, in neither of these cases was there any substantial evidence that the draftee had been ordained, so that in those cases the issue here presented did not exist. The Circuit Court, therefore, is the first court to have rendered meaningless the word "ordained" so carefully put into the statute by Congress. We believe that this is contrary to the intention of Congress and certainly is a question which should be finally decided by this Court.

POINT III

The Circuit Court of Appeals erred in holding that there was evidence before the Draft Board to justify a denial of petitioner's claim for exemption.

This issue is important not because of the fate of petitioner as an individual, but because it searches the integrity of administrative and judicial processes in wartime. For it has always been supposed that it was fundamental to the American way of life that no one could be deprived of his liberty on a determination which ignored all the evidence and which rested on surmise or prejudice. Yet while the decision in this case stands, these basic postulates are in doubt.

It must not be forgotten that petitioner's claim to exemption had been twice sustained by the Draft Board. The first time it was sustained following an investigation made by a rabbi of the Board's own choosing who certified that petitioner had been duly ordained (38). The second time it was sustained following complaints about the exemption (65, 66).

The Draft Board could reach a conclusion other than the one twice adopted by it only on the basis of new facts. The regulations expressly so provide (626.2-a, supra p. 16). They cast on the Board a burden of inquiry which it did not fulfill. There were three issues on which the Board might have been expected to make inquiry; whether petitioner had been duly ordained; whether, if not ordained, he was supported by his sect*, and whether he was functioning as a rabbi. We submit that the Draft Board did not perform the duty imposed on it by law. It made no investigation. It conducted no inquiry. It abdicated its function to the so-called theological panel, a body not sanctioned by the law nor provided for in any regulations.

* Of this there never was any question here.

And, as we shall show, the conclusion arrived at by the panel was in complete disregard of the evidence.

It is petitioner's contention, moreover, that the action of the Draft Board was motivated in large measure, not by a consideration of the facts of petitioner's ordination and functioning, but by the Board's belief that petitioner was not entitled to exemption because of his interest in the law and because of the answers elicited by one of the members of the panel with regard to certain matters of rabbinical knowledge. Because no findings were made by the Board, this contention can be established only by an examination of the testimony of Mr. Goldman and Rabbi Goldstein. Mr. Goldman, the only member of the Draft Board who testified, when first called upon to justify the refusal to continue the exemption, said:

> "It seemed to us that he was more inclined to follow the law than to establish himself as a rabbi" (42);

and Rabbi Goldstein, the only member of the panel who testified, said:

> "We found him to be interested in law" (97).
> "I felt that he did not know anything * * *. The boy did not understand" (98).

Rabbi Goldstein also referred to various questions which he had asked petitioner at the time of the panel hearing (138-140) and interpreted these questions and the answers for the purpose of establishing his contention that petitioner was not learned in Hebrew law (98-100).

We submit that it was improper for the panel to question petitioner on these subjects or for the Draft Board to pay any attention either to petitioner's alleged ignorance of Hebrew law or to his completion of his legal studies. Before discussing this we shall first consider the question of petitioner's ordination, then the question of his functioning.

A. The evidence compelled the conclusion that petitioner had been duly ordained.

Petitioner claimed to have been ordained by Rabbis Mendelsohn and Levine and also by his own father, Rabbi Boruch Trainin. He produced certificates of ordination from all three rabbis. Rabbi Mendelsohn was dead, but the other two rabbis who had ordained him appeared before the Board and attested to his qualifications (28, 34, 116, 122). They also testified to like effect before the Court (115, 119, 120). Neither of them was called before the panel.

The evidence which the Draft Board had before it on the question of petitioner's ordination consisted of the following: the communication of September, 1941, from Rabbi Leiter, whom the Draft Board had chosen to investigate the subject, certifying that petitioner was duly ordained (38), and the testimony of five rabbis at the hearing before Mr. Goldman in December, 1943, that petitioner was duly ordained (28, 34). These was no evidence whatever to the contrary.

The only question which apparently arose at the Goldman hearing in December, 1943, was whether or not one rabbi had the right to ordain another (see 72). On this point the Board had originally been informed by Rabbi Leiter, who wrote: "In accordance with Rabbinic law an individual may be fully ordained by another individual rabbi and thus be qualified as a rabbi in Israel" (38). Petitioner explained the Hebrew law on this subject to Mr. Goldman at the December hearing (72), as did Rabbi Savitz (86, 87). Mr. Goldman admitted in court that he had been so advised by petitioner's witnesses (43) and that he had no other information on the subject (44). It is clear from the record (see particularly 44, 45) that the Draft Board could not have reached a conclusion contrary to the views expressed by these rabbis, for it had no other basis on which to proceed. And that these views are correct fully appeared from the hearing in court. The rabbis were all unanimous

that under Jewish law one rabbi could ordain another (83, 95, 113, 122). Even respondent's witness, Rabbi Goldstein, who was a member of the panel, admitted that this was so (101). Clearly, therefore, the action of the Draft Board could not be sustained on this ground.

The only other question which was ever raised related to the form of the ordination certificate. This question, however, was not discussed by Mr. Goldman with the five rabbis who appeared before him. It was discussed at the panel hearing. But the form of that discussion did not constitute evidence upon which the Draft Board was entitled to proceed. Mr. Goldman testified that the Board was of the opinion that the certificates produced by petitioner were not in proper form because they lacked certain words (45, 46). Mr. Goldman in support of his conclusion relied solely on the panel's refusal to certify petitioner* and on certain testimony given before the panel (45, 46). However, what Mr. Goldman referred to did not constitute any evidence whatever in support of his conclusions. Mr. Goldman (45, 46) quoted from the later part of the panel testimony on this subject (139, 140). We quote the earlier part of it:

> "Q. And you tell me that your contention is that these certificates which you have submitted herein contain the conventional words yoreh—yoreh, yodin—yodin? A. Just let me answer that, please.
>
> Q. Yes or no? A. Yes, they do—in spirit.
>
> Q. Not in words? A. No. Naturally, if they aren't there.
>
> Q. Now, then, I see— A. Wait, something else—when I received my semichahs the reason why they did not put the words in there, they said one doesn't necessarily have to put them in. One can give a semichah in his own language" (128).

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* He was, at that time, ignorant of the panel's reasons. These had been embodied in a memorandum (21) which Mr. Goldman did not see until months after this hearing (32).

Petitioner's statement then made before the panel that it was not necessary that there be any particular form of words was not controverted by anyone. Indeed, it is clear that Mr. Goldman, when the rabbis appeared before him in December, 1943, did not inquire into the question of the form of the certificates at all. Petitioner was asked at the trial whether there had been any discussion about the form of the certificates at the December hearing. He said that Mr. Goldman told him and the other rabbis that he had not yet looked into the file (73). Mr. Goldman did not contradict petitioner's testimony on this subject. However, Mr. Goldman admitted at the trial that the five rabbis had voucher for petitioner and had stated that he had been duly ordained. Combining several questions and answers, Mr. Goldman's statement was "The other rabbis urged that he (meaning petitioner) was a duly ordained rabbi" (34).

Before the Trial Court every rabbi who discussed the subject stated that no particular form of words was necessary in order to ordain a rabbi. Rabbi Savitz said: "There is no particular form of words" (83). Rabbi Dushowitz: "There is no particular text to be used" (95). Rabbi Gartenhaus: "Many of them are 'Yoreh-Yoreh', but it is not a rule that it should be" (113). Even Rabbi Goldstein, respondent's witness, agreed that Jewish law did not prescribe any particular form of words, although he claimed that it was the custom of seminaries, "and as a rule, individual rabbis", to use certain words (101). Of course, Rabbi Goldstein had not appeared before the Draft Board.

In the face of the letter from Rabbi Leiter (38), the statements of the five rabbis who appeared before Mr. Goldman (34) and the certificates of the two rabbinical organizations (9, 36, 37), it is inconceivable how the fact of petitioner's ordination could be questioned.

It is evident from the foregoing that the Draft Board disregarded the evidence and, accepting merely the fact of the panel's refusal to exempt petitioner, abdicated the function of decision vested in it by law. Under these circum-

stances its decision was arbitrary and should have been set aside. See *United States ex rel. Rubin* v. *Magruder*, 55 F. Supp. 947.

The Circuit Court of Appeals in disposing of the question of petitioner's ordination indulged in some strange speculations not supported by the record. It suggested (189) that "despite the high character of the gentlemen involved" they may have lent themselves to a fraud by certifying petitioner as competent. There is not the slightest basis for such an inference. It is an affront to the standing of the rabbis who ordained petitioner and to the rabbis and organizations who supported his claim before the Draft Board and the District Court. In reaching this conclusion the Circuit Court made the statement that petitioner's case was not "savory" because he gave varying dates for his ordination—a matter of no consequence whatever, for all that mattered was whether he had been ordained*—and because, said the Court, he seemed able to produce a new certificate "whenever his chances of exemption began to look a little dark" (188). For this remark there is no justification whatever in the record.

Petitioner claimed ordination by three rabbis: his father, Rabbi Mendelsohn and Rabbi Levine. He said that he produced the ordination certificates of the latter two when he originally claimed exemption in August, 1941 (73). This is also established by the letter of Rabbi Leiter, who had been chosen by the Local Board to look into the claim for exemption (16). For he wrote on September 4, 1941, that petitioner's "documents show that he was duly ordained by the Rabbis Jacob Mendelsohn, of Newark, New Jersey, and Alexander Levine, of Brooklyn, New York" (38). The certificate of the father was, to be sure, submitted much later and after the panel hearing (74). But the production of that certificate after the panel hearing could not have

* Petitioner's lapses of memory on this subject could not have been made in order to deceive anybody. They were contained in papers filed by him with the Draft Board from time to time. They could have but hurt, not helped, his case.

helped petitioner at all, since it also did not contain the so-called "talismanic" words. The form of certificate of ordination given by petitioner's father was substantially the same as that of the other two certificates which had already been produced. (See translation of all three certificates, 81-85.) There is, therefore, no basis for the Circuit Court's aspersions on petitioner.

Finally, the Circuit Court said that the action of the Local Board was justified because "certain rabbis asserted" that particular words were essential to constitute proper ordination (189). There were no such "certain" rabbis, or any such single rabbi. No rabbi appeared before the Local Board who made any such claim. Mr. Goldman never so contended. All he said was that he got the impression from a question asked by a member of the panel that such words were necessary (45, 46). But there was no evidence of any kind that Hebrew law required such words.

In view of the uncontroverted facts and the serious misinterpretation of them by the Circuit Court, we respectfully submit that this Court should intervene so that justice be done.

B. With regard to petitioner's functioning as a rabbi.

Petitioner at all times claimed that he was not only an ordained rabbi but also that he was functioning as the rabbi of the Congregation Tifereth Zion Anshe Sfard. He so claimed in his first questionnaire, saying: "I do customarily serve as a minister (159). He so claimed in his occupational questionnaire, saying: "I am the spiritual leader of my congregation" (160) and he there gave the name and address of the congregation (160).

Mr. Goldman, the member of the Draft Board, admitted that petitioner had so claimed before the Draft Board (25, 28). Petitioner had submitted to the Draft Board two written contracts of employment which had been entered into between him and his congregation, one for three years made in August, 1941, the other, a modification and

extension, on December 1, 1943 (47; see also 6). He also furnished programs showing that he had officiated as a rabbi at dedication ceremonies (62). The Draft Board had before it the certificate of the Assembly of Hebrew Orthodox Rabbis dated August 1, 1941, which described petitioner as the rabbi of the congregation (36). Subsequently a certificate was filed by the Federation of Orthodox Rabbis of America which certified that petitioner was the rabbi and spiritual leader of the congregation (37).

Petitioner in his affidavit on which the habeas corpus proceedings rested maintained that he had been continuously functioning as the rabbi (6), saying, moreover: "That I have actually been functioning as a rabbi for over 5 years has not been disputed or questioned by anyone" (7). And that is the literal fact.

The Local Board never made any investigation with regard to petitioner's functioning as a rabbi, although the congregation was less than a mile away from the Local Board's office (47, 48). The only time the Local Board had any contact with any member of petitioner's congregation was in the spring of 1942, following complaints about the exemption previously granted. At that time the president of the congregation was called in. He evidently satisfied the Board concerning petitioner's status, because after interviewing him the Board continued petitioner's exemption (66).

The Board having made no inquiry of its own (see also 26, 28), apparently relied on an inquiry made by headquarters (28). The result of that inquiry, contained in a memorandum of November 17, 1943, was, however, not made known to the Draft Board until March 20, 1944 (21, 22), which was after the mailing of the notice of induction on March 11th and just before the induction itself (20). This memorandum was not relied on by the Board in making its decision withdrawing petitioner's previous exemption (29, 30); nor was it before the Appeals Board (61). We shall show hereafter that the memorandum should never have been received in evidence.

However, there is nothing in the memorandum which would have justified a disregard of all the other evidence. The memorandum itself (168-172)is a composite of information obtained from various sources. It concerned itself primarily with petitioner's study of the law, it in no way contradicted petitioner's contention that he functioned as rabbi of the congregation.

It is evident that the Draft Board was not really concerned with this subject, because Mr. Goldman did not question the rabbis who appeared before him in December, 1943 about it at all (89, 116). He was then concerned only with the right of one rabbi to ordain another (28, 43, 87, 89, 116). Indeed, Mr. Goldman in effect admitted that petitioner had been "functioning", but sought to minimize his activities because the congregation was a small one (42).

Petitioner himself had testified before the panel that he delivered sermons (130, 131), had participated in unveilings (131) and had performed weddings (131, 132). At the hearing before Judge Inch petitioner testified that he had told this to the Draft Board, both to Mr. Schulman in April, 1942 (70, 71) and to Mr. Goldman in December, 1943 (72). Neither of these persons contradicted petitioner. Petitioner and his father both testified before Judge Inch with regard to the functions which petitioner performed as rabbi (66-72, 121, 122).

Despite all of this the Circuit Court said that petitioner never "strongly" pressed his claim that he was functioning as a rabbi and that there was "ample justification" for the Board's action in rejecting this claim (188). We submit that the Circuit Court erred in both respects.

It is true that before the Circuit Court petitioner relied primarily on the fact of his ordination, believing that this alone justified exemption and that it had been conclusively established. In view of the fact that respondent had never questioned petitioner's contention that he was entitled to exemption by reason of his ordination alone, such

a position was a quite natural one. However, the facts with regard to the functions performed by petitioner were called to the Circuit Court's attention both in the original briefs and on the application for rehearing. We submit there is no basis for its conclusion that the Board was justified in rejecting petitioner's contention in this respect.

In the first place, there is no way in which it can be ascertained that the Board actually ever did this. Since the Board made no findings, we can only ascertain the basis for its action from the testimony offered at the hearing before Judge Inch. There only Mr. Goldman testified. It is evident from his testimony that the Board was concerned primarily with petitioner's ordination and not at all with the actual functions performed by petitioner (see discussion at p. 23, *supra*).

The Circuit Court further stated that petitioner's proof on the subject of his functions was "fairly well discredited on cross-examination" (188). The Court referred to an "admission" that petitioner performed only one wedding and could not remember the names of the principals (182). This was a misreading of the record by the Circuit Court. It is true that petitioner had testified before the panel that he had performed only one wedding (132), but that was in response to a question concerning weddings performed for members of the congregation. On the other hand, petitioner remembered the name of the family, Goodwin. Moreover, before Judge Inch petitioner testified about many other weddings which he had performed (75), of persons evidently not members of his congregation, and he specified the name of another family, Berkowitz (76). As he then said, most of those who went to him to be married "were people from the section that I do not even know" (76). There is no basis, therefore, for the suggestion which the Circuit Court made that petitioner's testimony was in any way discredited by the cross-examination.

This cross-examination, of course, dealt with all kinds of absurd details concerning clothing and weather on occa-

sions which there was no reason for petitioner to have fixed in his memory. It reached such a point in the cross-examination of petitioner's father that the Court finally stopped it (124).

We submit that all of the evidence in this case required the conclusion that petitioner was actually functioning as a rabbi. Moreover, in view of the fact that the Draft Board made no findings and that it is, therefore, impossible to determine on what basis it rested its decision, the least which should have been done to protect petitioner's rights was to remit the matter to the Draft Board for the purpose of making its position clear. The Circuit Court suggested that the Board might "without a full picture of the entire situation" disregard the testimony favorable to petitioner "as somewhat colored by interest" (189). We submit there is no basis for the inference that the rabbis and rabbinical organizations were in any way colored by interest. If the picture had not been made sufficiently full the proper way to resolve any doubt would have been to make further inquiry, not to disregard the regulations and reclassify petitioner without proof of new facts and without even hearing him (36). The very least that the Court should have done under these circumstances was to send the case back to the Board. Compare *United States ex rel. Reel* v. *Batt*, 141 F. 2d 845; *United States ex rel. Kornfeld* v. *Cain*, not yet reported, decided September 7, 1944, by Judge Abruzzo in the Eastern District of New York.

C. The Board erred in considering irrelevant matter.

We have already shown that the Draft Board based its conclusion in large part on petitioner's alleged lack of qualifications and on the fact that he applied for admission to the bar.

Neither the law nor the regulations give the Draft Board the right to pass on the fitness of a person to be a minister of religion. To permit the Board or any agency acting on its behalf to do this would result in its becoming in effect

a licensor of ministers. Under the American Constitution religion must remain free from such interference. See *Cantwell* v. *Connecticut*, 310 U. S. 296; *United States* v. *Ballard*, 322 U. S. 78. If the members of a particular sect have chosen an individual to be their spiritual leader no other authority may deny them that right. The Draft Board's function should be merely to determine whether or not in fact a person is recognized by his sect to be a minister, either by ordination or otherwise. The Board cannot concern itself with a person's qualifications.

It was, therefore, an impertinence for the panel to question petitioner in order to ascertain whether he was fit to be a rabbi and for the Board to give this matter any consideration whatever. The Circuit Court of Appeals recognized that a person's qualifications to act as a minister are immaterial, but upheld the inquiry into the qualifications as relevant on the issue of "the good faith and truth of the original claim of exemption" (190). That seems to us to be reasoning in a circle. If the qualifications of a person to act as a minister are immaterial to his right to exemption, they should not be inquired into at all. Otherwise no one can ever determine whether the inquiring agency based its conclusion on the irrelevant or the relevant factors. To say that the qualifications cannot be inquired into when it is admitted that the registrant is a functioning minister but can be inquired into when that is not admitted is a meaningless distinction. For the problem only arises when there is some question about the claim of exemption.

So with the questions dealing with petitioner's legal studies. Here also the inquiry was irrelevant. Neither the law nor the regulations require that a minister must, in order to be exempt, devote all his time to the practice of the ministry. The regulations merely require that a person "customarily" act as a minister. It was, no doubt, recognized that to allow exemption only where a person was acting exclusively as a minister would be a great hardship in many parts of the country. For it is well

known that ministers are often unable to live on what their congregations can pay them and must engage in other occupations. Thus from time immemorial ministers of all faiths have been teachers, lecturers, farmers, mechanics and even lawyers.

We do not mean to suggest that a board may never consider the extent to which the registrant actually pursues another calling. Such activity might indicate an abandonment of the ministry. But here petitioner had not pursued any other calling. He had merely studied law and sought admission to the bar. The fact that he was conducting legal studies was stated in his original questionnaire (7). It was not considered as a ban to his being exempted then. That he should have brought his legal studies to a completion could not in any way affect his continued right to exemption. Wholly impertinent were the questions as to petitioner's future intentions. If, after admission to the bar, petitioner had so conducted himself as a lawyer as to indicate an abandonment of his ministerial status it would have been, of course, appropriate for the Draft Board to have reconsidered his exempt status. No such occasion had arisen. It was, therefore, improper for the Board to consider petitioner's claim for exemption as a minister in the light of his application for admission to the bar.

In view of the impossibility of determining the extent to which these improper elements entered into the Board's determination here, the very least which the Court should have done was to have sent the case back to the Board with instructions that the Board reconsider petitioner's status without any regard to his having completed his legal training or to his alleged lack of qualifications. See *United States ex rel. Reel* v. *Batt*, 141 F. 2nd 845; *United States ex rel. Kornfeld* v. *Cain*, not yet reported, decided September 7, 1944, by Judge Abruzzo in the Eastern District of New York.

Petitioner's application for certiorari should be granted because the action of the Draft Board cannot be sustained on any possible reading of the evidence. Unless it is granted, petitioner will have been denied substantial justice.

POINT IV

The Draft Board improperly abdicated its functions to a panel not vested with any authority by law.

It is clear from a reading of the record here that the Draft Board in effect abdicated its function and let the panel determine the basic issue. This panel on theological qualifications, which was set up by the New York Selective Service Headquarters, was not authorized either by law or any regulations. That was conceded by Col. Durham who was in charge of the panel (59). According to him the purpose of the panel was to pass on various technical questions which might arise in the theological field "just as we use them in the medical field and in the occupational field and in the case of conscientious objectors" (56). Of course in the case of conscientious objectors there is a special hearings machinery set up by the law and regulations which has no parallel here.

Whatever justification there might be for setting up a panel on theological matters to deal with technical questions which might arise, there was no justification for doing what was done in the case at bar. A panel set up to deal with technical questions would be expected to give expert opinion on limited questions. Such a panel, for instance, might be called on to express an opinion with regard to the right of one rabbi to ordain another or with regard to the form of certificates of ordination. Moreover, in any case in which an advisory panel might be called upon to express an opinion it would be essential that such opinion be communicated to the registrant so that he could

have an opportunity of producing expert testimony of his own and of convincing the Local Board, which had the burden of decision, that his experts and not those on the panel were the better qualified to express an opinion. Nothing of the sort was done in the case at bar.

In the first place, the panel was not asked to answer any technical questions at all, nor did it purport to do so. While the panel set forth certain reasons for its action in a confidential statement dated November 17, 1943 (21), that memorandum was not known to the Draft Board at the time, or until March 20, 1944 (32). It was never seen by the Appeals Board (61, 62). The only information which the Draft Board received at the time it reclassified petitioner was a letter stating merely that the panel "voted unanimously to recommend that registrant's status did not warrant his classification in Class IV-D" (31). This communication was sent to the Local Board on November 24, 1943 (17). On December 9th (18) and without in the meantime communicating with petitioner (36) the Draft Board reclassified him and rescinded his exemption (18).

It is obvious from this sequence of events that the Draft Board did not consider that the panel was called upon to express its expert opinion for the guidance of the Board. The panel had expressed no opinion, the registrant had been advised of no such opinion. He had been given no opportunity to combat any opinion which might have been expressed. The Draft Board evidently considered that it was the panel's function to advise on the basic issue which the law confided to the Draft Board for its decision. We submit that the panel properly could have no such function. The panel should never have been asked to express any opinion with regard to a registrant's right to exemption. It should have been confined solely to the function of expressing its opinions on technical questions, opinions, moreover, which would be but part of the evidence of the case, with opportunity to the registrant to controvert them.

For failure to pursue this elementary principle of fair play the action of the Draft Board here must be set aside.

POINT V

The decision of the Draft Board was improperly sustained on the basis of material which was not before the Draft Board at the time it reclassified petitioner.

We have already called attention to the fact that in the draft file admitted in evidence were three papers not considered either by the Local Board or the Appeals Board. They consisted of the Emanuel report of November 17, 1943 (29), the Agress report of November 23, 1943 (31), and the panel's confidential memorandum (31). These papers were first placed in the file on March 20, 1944 (29, 31, 32), and were not before the Local Board at the time it reclassified petitioner (29-32). Nor were they ever before the Appeals Board (61, 62). Nevertheless, the Court denied motions to strike these papers from the record (31, 32, 62).

In his opinion, Judge Inch attempted to justify this action by the statement that the papers reached the Local Board before petitioner was actually inducted, so that the induction could have been prevented had the papers required that result (154)! Petitioner had been ordered on March 11, 1944, to report for induction on March 22nd (20); the papers reached the Local Board on March 20th (29, 31, 32). The only evidence that the Board reconsidered petitioner's status in the light of these papers is a letter dated March 21st which states that the matter was reviewed on the night of March 20th and no further action taken by the Board (179). There is no evidence that petitioner was informed of this intended action, that he ever saw the three papers or had any opportunity to rebut any statements in them which might appear to be adverse to his claim. Consequently the Board had no right in this underhand fashion and at the eleventh hour to support the action taken by it months before. See *Matter of Daley* v. *Board of Estimate*, 267 App. Div. (N. Y.) 592; *Newbrand* v. *City of Yonkers*, 285 N. Y. 164.

On no theory can an administrative determination be sustained by reference to material not considered by the administrative agency and which the person affected had no opportunity to answer. See *Morgan* v. *United States*, 304 U. S. 1.

The Circuit Court of Appeals (183) sustained the reception of these papers on the ground that they had been considered before petitioner's induction and that their gist was included in the panel minutes. The latter statement is not supported by the record; the former runs counter to the authorities cited to the Court and unless repudiated by this Court will have far reaching results in administrative law, results contrary to American notions of fair play.

It must be assumed that respondent, in offering the three documents (164, 168-175) intended to add something to the material already before the Court; otherwise there would have been no object in their being offered. And this assumption is borne out by the facts. For nowhere in the panel minutes (125-140) were there any references to the number of persons in the congregation as twenty to thirty (indeed petitioner there said the number was fifty-five [133]); nor was there any reference to the number of children in the Hebrew school. The only reference in the panel minutes was to the number of persons said by Mr. Emanuel to have been present on the night he said he was in the synagogue (135). Yet the Circuit Court recites as facts (182) the statements found in the Emanuel report alone that there were only ten pupils in the school and twenty to thirty members of the congregation. Moreover, the Emanuel report was the only source of the Court's statement that petitioner's father was still the "true rabbi" of the congregation (182) and that most of petitioner's interest "seems to have been in the law" (188). These "facts" were evidently considered sufficiently important for separate statement by the Circuit Court and were accepted as true, though based on vague hearsay. Yet the Emanuel report was not before the Draft Board when it made the order

here under consideration, nor before the Appeals Board that reviewed it. Moreover, petitioner was afforded no opportunity by the Board to controvert any of the statements contained in the Emanuel report.

It is clear, therefore, that the Circuit Court was in error in stating (183) that the panel's minutes contained the gist of the various documents objected to. These minutes contained only a passing reference to the Emanuel report (135), they obviously referred in no way to the panel's own memorandum which was made after the completion of the panel's hearings, or to the Agress report which was not made until November 23, 1943.

We submit also that the Circuit Court erred in sustaining the reception of these papers on the ground that they had been considered after the order to report for induction, which is the administrative action here being challenged. Unless that order rests on a valid classification, the order is void and detention by the Army illegal. The Circuit Court recognized that principle in *United States ex rel. Beye* v. *Downer,* 143 F. 2d 125, when it reversed an order dismissing a writ of habeas corpus because of premature classification.

In the case at bar the order to report for induction was made on March 11, 1944 (20). It rested on the re-classification of December 9, 1943 (18), confirmed on December 27th (18, 19), and upheld by the Appeal Board on February 16, 1944 (20). Nothing that happened thereafter can possibly be used to sustain petitioner's induction. It would be "sheer denial" of due process (*DeJonge* v. *Oregon,* 299 U. S. 353, 363) to permit a person to be deprived of his liberty (and that is the consequence of induction into the Army) on the basis of evidence received in secret after the determination which is the basis for the deprivation of that liberty. No belated receipt of material by a local board can retroactively validate improper action. No administrative tribunal has the right to act on evidence not shown to the person affected, evidence he has had no chance to rebut.

Moreover, the regulations (626.2-a, b; *supra*, p. 16) forbade any reconsideration of petitioner's classification on March 20, 1944, which was after petitioner had on March 11th been ordered to report for induction (20). The regulations permit the reconsideration of a registrant's status after the issuance of the notice to report for induction only in two situations, neither of which existed here. The matter can be reconsidered if the Local Board "specifically" finds that there had been a change in status due to circumstances over which the registrant had no control. There is here no claim that such change had occurred, nor was there any specific finding by the Board that it had. The other exception is conditioned upon the written request of either the Director of Selective Service or the State Director. No such written request was made in the case at bar. Consequently any suggestion that the Board reconsidered petitioner's status on March 20, 1944, on the basis of the material then for the first time brought to its attention must be discarded. Such act would have been a violation of the regulations.

The position taken by the Circuit Court on this subject strikes at the very heart of due process. How can this Court sanction so flagrant a denial of ordinary fair play?

CONCLUSION

It is respectfully submitted, therefore, that because of the important legal questions involved in this case which deal with the method of administering the Draft Law and also affect judicial review of other administrative decisions and because substantial justice has been denied petitioner in the courts below, this Court should grant the writ of certiorari which has been applied for.

Respectfully submitted,

OSMOND K. FRAENKEL,
Attorney for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 694

UNITED STATES EX REL. BORUCH TRAININ, FOR AND ON BEHALF OF ISAAC TRAININ, PETITIONER

v.

COLONEL DAVID E. CAIN, COMMANDING OFFICER, CAMP UPTON, NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 180–190) is reported at 144 F. (2d) 944. The opinion of the district court appears at R. 149–155.

JURISDICTION

The judgment of the circuit court of appeals was entered September 12, 1944 (R. 206), after a petition for rehearing had been denied (R. 205). The petition for a writ of certiorari was filed

November 20, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Selective Training and Service Act of 1940 and of the Selective Service Regulations are set forth in the Appendix, *infra*, pp. 26–30.

QUESTIONS PRESENTED

1. Whether there was substantial basis for the action of the Selective Service appeal board in denying petitioner classification as a minister of religion and in classifying him as available for military service.

2. Whether the appeal board improperly considered the recommendation of a panel of experts, established by the Selective Service System, which interrogated petitioner to determine whether he was a bona fide minister of religion within the meaning of the Act and the Selective Service Regulations.

3. Whether a registrant possessing a certificate of ordination as a minister of religion who does not customarily perform the duties of a minister is exempt from military service under Section 5 (d) of the Selective Training and Service Act of 1940.

STATEMENT

Having been classified I–A (available for military service), petitioner was, on March 11, 1944, ordered by his local board to report for induction on March 22, 1944 (R. 20). He reported, and on the same day his father instituted the present habeas corpus action on his behalf. The petition for the writ (R. 3–5) alleged, in substance, that petitioner [1] was a minister of religion and that the local board's refusal so to classify him was based on an erroneous construction of the Selective Training and Service Act of 1940, and on an arbitrary and unreasonable finding of fact. The petition was supported by an affidavit (R. 6–9) executed by petitioner which recited his version of the events which culminated in his induction, as well as by other exhibits (R. 9–12). The writ issued (R. 2) and a return (R. 13) was made by respondent, which alleged that petitioner was lawfully selected for military service and inducted under the provisions of the Selective Training and Service Act of 1940. Petitioner formally traversed the return (R. 14) and a hearing was had. The evidence adduced at the hearing may be summarized as follows:

Petitioner was born in Russia in 1919 and migrated to this country in 1929 (R. 118). He

[1] As did the court below, we shall refer to the registrant, Isaac N. Trainin, as "petitioner."

registered with local selective service board No. 200 in Brooklyn on October 16, 1940 (R. 15). His questionnaire was mailed to him on June 24, 1941, and it was returned completed on July 7, 1941 (R. 15). In his questionnaire he stated that he was a minister of religion customarily serving in that capacity; that he was ordained on June 1, 1938, by "Chief Rabbi of Newark at Brooklyn, N. Y.;" that he was not a student preparing for the ministry in a theological school; and that he had been a minister of the Jewish faith since January 1, 1939 (R. 159).[2] At the same time petitioner submitted to his local board an ordination certificate executed by Rabbi Jacob Mendelson (R. 161) and one executed by Rabbi Alexander Levine (R. 163). Both were written on letterheads and were in Hebrew. They were executed in June 1940 and while they purported to be certificates of ordination they differed from the usual certificate in that they did not contain the words "Yoreh-Yoreh" or "Yodin-Yodin," which are customarily used to authorize an or-

[2] In November 1942, petitioner likewise filed with his local board an occupational questionnaire in which he stated that the title of his present "job" was "Rabbi"; that he began this work in March 1937, and that the length of his experience in this type of work had been five years and eight months. In describing the duties of his "job" petitioner stated, "I am the spiritual leader of my congregation and principal of the religious school"; that he was employed by the Tifereth Zion Anshe Sfard synagogue; and that the "job" for which he was best fitted was that of being a rabbi (R. 160).

dained rabbi to act in specified religious matters (R. 98, 101).[3]

Since petitioner claimed exemption as a rabbi, the local board requested one Rabbi Leiter to investigate his status as a rabbi (R. 16). Rabbi Leiter advised the board that he believed petitioner to have been properly ordained (R. 38).[4] On the basis of this information the local board on October 16, 1941, classified petitioner IV–D (minister of religion) (R. 16, 27).

In the spring of 1942 the local board received several anonymous messages to the effect that petitioner had never attended a rabbinical school, that he had obtained his ordination certificates by fraud, that he was not qualified to be a rabbi, and that it was his father, not petitioner, who was the rabbi for the synagogue with which petitioner claimed he was associated

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[3] Petitioner's selective service file also contained a communication from the Hebrew Orthodox Rabbis of America and Canada stating that petitioner was a member of that organization, and a communication from the Federation of Orthodox Rabbis of America to the effect that petitioner was a duly ordained rabbi and was the rabbi of the Congregation of the Tifereth Zion Anshe Sfard synagogue of Brooklyn, New York (R. 36–37).

[4] Rabbi Leiter also advised the board to verify petitioner's status by inquiring at the city's marriage license bureau to determine whether petitioner was recognized as a minister of religion. The board made such inquiry and was informed that petitioner had not sought recognition from the bureau as a rabbi; a second inquiry on or about October 10, 1941, revealed that in the interim petitioner had been registered as a rabbi (R. 16, 27, 39).

(R. 16–17). The board continued petitioner's classification after interviewing a witness for petitioner (R. 65–66).

Thereafter, on June 3, 1943,[5] the events which culminated in petitioner's ultimate reclassification to I–A commenced. On that date the local board received a letter from the committee on character and fitness of the Supreme Court of New York, accompanied by a consent from petitioner, requesting permission to examine petitioner's selective service file in connection with his application for admission to practice law. The board granted the request. (R. 17.) On June 30, 1943, the New York City Selective Service Headquarters requested petitioner's file "for the purpose of review" (R. 17). Up to this point, petitioner had not informed the local board "that he was completing his course in law" or "serving as a clerk in a law office" (R. 20; see *infra,* p. 12).

City Headquarters assigned an investigator to petitioner's case and on November 17, 1943, he submitted his report to headquarters (R. 168–172).[6] Without detailing the findings of the report, it is sufficient to note here that it cast serious doubt upon the bona fides of petitioner's

[5] The date June 3, 1942, appearing in the printed record (R. 17) is obviously an error. The context shows that the correct date was June 3, 1943.

[6] This report is characterized in the petition (p. 41) as the "Emanuel Report."

claim that he was a rabbi. In the meantime petitioner had been requested by the City Selective Service Headquarters to attend a hearing on November 17, 1943, in respect of his classification as a minister of religion. He appeared on that date and, in accordance with the usual practice in New York City in such matters, he voluntarily submitted to interrogation by a panel of experts established to render advisory opinions on technical religious matters. The panel that examined petitioner consisted of Dr. Alexander M. Dushkin, Executive Director of the Jewish Educational Committee of New York, Rabbi Herbert S. Goldstein, Rabbi of the West Side Institutional Center; Judge Jonah J. Goldstein of the New York Court of General Sessions; Rabbi Israel H. Leventhal of the Brooklyn Jewish Center; and Judge Samuel Null of the Supreme Court of New York (R. 57).[7]

When petitioner appeared before the theological panel, the panel had before it his selective service file, and on the basis of the materials contained in it the panel closely examined petitioner concerning the bona fides of his claim that he was a minister of religion customarily serving as such. On the basis of that examination and with full knowledge of the materials contained in petitioner's selective service file, the panel recom-

[7] The details concerning the organization of this panel are set forth at R. 53–58 and are discussed at pp. 19–22, *infra*.

mended by unanimous vote that petitioner not be classified as a minister of religion [8] (R. 58). In a statement dated November 17, 1943, the panel stated (R. 164):

> Upon a review of the file in this case, and examination of the registrant, the members of the panel are convinced beyond a doubt that registrant has never duly functioned as a rabbi, and in any event is not qualified, either by training or character, to function as a rabbi. The certifications he has presented are not in the traditional rabbinic form.
>
> Moreover, the responses made by the registrant to questions asked of him clearly indicate an attempt to pile up pretext upon pretext, and evasion upon evasion, for the purpose of concealing the fact that he is not qualified as a rabbi and is not functioning as a rabbi in a bona fide manner.[9]

On November 23, 1943, petitioner voluntarily appeared at City Headquarters, accompanied by a relative, "to request further administrative re-

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[8] An explanation of the technical religious matters which were involved in the panel's interrogation of petitioner and the reasons for the panel's conclusion are set forth in the testimony of Rabbi Goldstein (R. 96–112).

[9] While the recommendation of the panel and a transcript of the interrogation of petitioner was forwarded without delay to the local board and placed in petitioner's selective service file, the panel's statement of the reasons for its recommendation was not forwarded to the board until March 18, 1944 (*infra*, p. 11). The statement was considered by the board in its final review of petitioner's classification on March 20, 1944 (*infra*, p. 11).

view of the case."[10] A memorandum (R. 173–175) of that interview was prepared and was forwarded to the local board at a later date (see *infra*, p. 11). On November 24, 1943, City Headquarters notified the local board of the panel's recommendation and forwarded to the board a transcript of petitioner's testimony at the hearing before the panel (R. 17–18, 30–31). On December 9 1943, the local board reclassified petitioner I–A by unanimous vote (R. 18). Petitioner requested a hearing before the local board and on December 27, 1943, petitioner appeared before the board accompanied by his father, his brother-in-law and three other rabbis (R. 18, 73). Petitioner testified in the present proceeding that Mr. Goldman, a board member, told him at that hearing that "he wanted to be impartial and hear our side of the story; and said he would read the entire testimony taken before the Panel" (R. 73). Thereafter the local board prepared a memorandum in which it stated that "after full consideration of the registrant's file and a statement made by registrant to the rabbinical panel, we believe that the classification of I–A is just and fair" (R. 18–19). At petitioner's request, the local board arranged an appointment for petitioner with the government appeal agent (R. 19), who,

[10] At this interview with Mr. Agress of City Headquarters, petitioner submitted a third certificate of ordination. This one purported to have been executed by petitioner's father on June 17, 1939. (R. 85–86.)

after interviewing petitioner, extended the time in which he could appeal and prepared two memoranda in respect of petitioner's status and his contentions (R. 19).

On January 10, 1944, petitioner took an appeal to the board of appeal (R. 19). Thereafter his file was forwarded to the appeal board and petitioner filed two unidentified letters and two exhibits with that board (R. 19). On February 16, 1944, the appeal board, "giving consideration to the relator's entire file," unanimously classified petitioner I–A (R. 20, 60–61). Thereafter, on March 1, 1944, petitioner wrote to National Headquarters of the Selective Service System, apparently seeking further administrative review, despite the fact that his right to appeal under the Selective Service Regulations had already been exhausted. That letter was forwarded to New York City Selective Service Headquarters and on March 18, 1944, that office advised petitioner that his case "had been subjected to careful investigation by our advisory panel of theological classifications, and upon all the information on record they are of the opinion that [petitioner] was properly classified by Local Board and by the Appeal Board and that no further administrative action is warranted in the matter." (R. 21.) In the meantime, on March 11, 1944, the local board issued its order directing petitioner to report for induction on March 22 (R. 20–21). On March 18 petitioner's letter to National Head-

quarters, accompanied by the November 17, 1943, statement of the theological panel (*supra*, p. 8), the November 17, 1943, report of City Headquarters' investigation, and the memorandum of petitioner's interview at City Headquarters on November 23, 1943, was forwarded to the local board for its consideration (R. 21). Despite the fact that petitioner had already been ordered to report for induction, the local board on March 21, 1944, reviewed these additional materials and after such review it "declined to take any further action in the matter" (R. 179).

The transcript of petitioner's testimony at the hearing before the theological panel (R. 125–140), which was received in evidence at the trial with the remainder of petitioner's Selective Service file (R. 15–24), shows that petitioner testified that he believed he was entitled to exemption from military service because he was an ordained rabbi and was "presently functioning as a Rabbi" (R. 126); that he was ordained in April, 1940 (R. 127); that in 1941 he sought to enter the Army as a chaplain, but that he was rejected by the Jewish Welfare Board, the duly constituted agency for passing on such matters, "because I had not functioned as a Rabbi" (R. 126); and that he was married and lived in the home of his parents (R. 128). In respect of his rabbinical education, petitioner testified that he had had no formal training or education in any religious seminary and that his religious training consisted of daily lessons from

his father and of one weekly lesson from Rabbi Mendelson during the years 1935–1937 (R. 129). During the period when he was being trained for the rabbinate, petitioner was also pursuing a secular education. He testified both before the theological panel and at the trial below that he graduated from high school in 1938; that he attended college from 1938 to 1940; that he entered St. John's law school in 1940, graduating in 1943; and that upon his graduation he took the New York State bar examinations and thereafter worked as a law clerk for a New York attorney. (R. 91–93; 129–134.) It was petitioner's claim at the hearing before the theological panel that he began functioning as a rabbi in 1939 when he was nineteen years old and was a freshman in college (R. 130). He testified that beginning in 1939 he delivered sermons in the synagogue for which his father was the rabbi; that he participated in the services at the unveiling of tombstones; and that in 1940, after he was ordained, he also performed weddings, but he could recall only the name of one member of the congregation for whom he had performed a marriage ceremony (R. 130–132).[11]

[11] Rabbi Goldstein, a member of the theological panel, testified that the panel considered petitioner's testimony concerning these activities, but that these activities did not establish conclusively that petitioner was a rabbi, because "unfortunately there are many people who do that, who are not ordained Rabbis. Every cantor in this city does it without being an ordained Rabbi. A cantor also performs wedding ceremonies and goes to funerals and unveilings, and it is not a particular function of the ministry." (R. 107.)

In answering broad general questions relating to basic religious matters and writings, petitioner was evasive and in respect of many questions he stood mute (R. 138–140).

The synagogue with which petitioner claimed to be associated was organized in 1937; petitioner's father was its first rabbi (R. 121). He testified at the trial that in 1939 he relinquished his position to petitioner and from that time on his function was to "take care of the building," "officiate at the services" and "read the scroll at services;" and that his son "preaches and performs Rabbinic duties" and is the principal of the synagogue's religious school, the teaching staff of which was composed of petitioner and his younger brother (R. 121, 133).

On the basis of this evidence the trial court entered findings of fact and conclusions of law adverse to petitioner's contentions (R. 140–146). The court found as a matter of law "that the [petitioner] was afforded full and fair hearings before the Local Board, Appeal Board and Panel on Theological Classifications; that said agencies acted in accordance with law and did not abuse the discretion reposed in them by the statutes applicable thereto; nor were said agencies arbitrary, capricious or unreasonable" (R. 145). On appeal the circuit court of appeals affirmed the judgment of the district court (R. 206).

ARGUMENT

1. Petitioner's principal contention (Pet. 10, 11–12, 17–21, 25–38) appears to be that the decision of the circuit court of appeals raises an important question in respect of the scope of judicial review of Selective Service classifications in habeas corpus, which that court decided wrongly. As the court below pointed out (R. 187) there has been no authoritative ruling by this Court on this question. It is our view, in accordance with that expressed in *Ex parte Stanziale,* 138 F. (2d) 312 (C. C. A. 3), certiorari denied *sub nom. Stanziale* v. *Paullin,* 320 U. S. 797, that judicial review of habeas corpus is limited to consideration of whether the registrant was afforded his procedural rights and a fair hearing, in the sense that the evidence which he offered was considered by the boards. We believe, however, that it is unnecessary in this case to resolve that important question. Even applying the substantial evidence rule for which petitioner contends (Pet. 17–21), it is plain that petitioner's classification is not vulnerable. Nevertheless, if the Court should desire to examine the question of the scope of judicial review on habeas corpus in this case, we do not, of course, oppose the granting of the writ for that purpose.

Since petitioner was finally classified by his appeal board (*supra,* p. 10), the propriety of his classification must be tested in the light of the evidence which was before that board. See *Bowles* v. *United States,* 319 U. S. 33; *Falbo* v.

United States, 320 U. S. 549, 555. The only evidence in the record concerning the appeal board's consideration of petitioner's case is the testimony of the chairman of the appeal board *supra,* p. 10, that the board gave consideration to petitioner's entire selective service file in reaching its unanimous conclusion that petitioner was not entitled to be classified IV–D as a minister of religion. Accordingly, it is clear that the only question which petitioner's contention presents is whether there is substantial evidence in petitioner's selective service file to support the appeal board's determination that petitioner was not entitled to exemption from military service as a minister of religion.[12] That there is such support for the appeal board's determination is, in our view, not open to serious question.

Selective Service Regulation 622.44 (a) (2) and (c) required the board of appeal to classify petitioner IV–D if it found that petitioner was a duly ordained minister of religion—"a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who

[12] We assume for the purpose of this argument that, as petitioner urges, the court may set aside a selective service classification and order an inductee discharged if the classification finds no substantial support in the registrant's selective service file.

customarily performs those duties." The court below found that there was sound basis for disbelieving petitioner's claim that he was duly ordained and that there was "ample justification" for the board's finding that petitioner did not customarily perform the duties of a rabbi (R. 188–189).

On the basis of the facts reflected by petitioner's selective service file when the board of appeal considered it, it is clear that a real issue of credibility existed. If petitioner's evidence was accepted as credible there was ample basis for finding that petitioner had been duly ordained, and while his evidence concerning his functioning as a rabbi was weaker, it was probably adequate to support a finding that he customarily performed the duties of a rabbi. But it is evident from the classification it gave petitioner that the appeal board disbelieved the evidence upon which petitioner relied.

Aside from the issue of credibility, we submit that the board of appeal's classification of petitioner is firmly supported by the evidence contained in petitioner's selective service file. The file showed that petitioner had been interrogated by a panel consisting of prominent Jewish laymen and clergymen who, it is not open to doubt, were eminently qualified to render an advisory opinion on the technical and complex questions raised by petitioner's claim to ministerial status. Petitioner voluntarily appeared before them and

consented to interrogation concerning his claim to exemption. That interrogation showed that petitioner's certificates of ordination were not in the customary form; that petitioner had had no formal religious education; that he claimed to have been a regularly functioning rabbi during the period when he was still obtaining his secular education; that he was pursuing a course of action calculated to lead to his practicing law; that the religious functions which he claimed to perform were functions which are also performed by persons other than rabbis; that petitioner was unable to enter the army as a chaplain because the Jewish Welfare Board had found that he was not a regular practicing rabbi; and, most important, that petitioner lacked the basic training necessary to enable him to perform the functions of a rabbi. As we have shown (*supra,* p. 8), the theological panel unanimously recommended that petitioner was not entitled to exemption as a minister of religion. This advisory recommendation, when viewed in the light of the transcript of the panel's interrogation of petitioner and of the special competence of the panel to deal with this subject matter, furnished substantial basis for the action of the appeal board. Furthermore, petitioner's classification was informally reviewed again by his local board as a result of petitioner's letter to National Selective Service Headquarters (*supra,* p. 11). At that time the local board had additional evidence which had not been in the file when the

appeal board reviewed it, including the panel's memorandum (*supra,* p. 8), and it found after reviewing the entire file again that petitioner was properly classified.[13] In these circumstances, both the local board and the appeal board having concurred in petitioner's classification and both the trial court and the circuit court of appeals having found no basis for invalidating that classification, we submit that there is no occasion for further review by this Court on the question of the sufficiency of the evidence to sustain the Selective Service Agencies. Cf. *Ex parte Stanziale,* 138 F. (2d) 312, certiorari denied *sub. nom. Stanziale* v. *Paullin,* 320 U. S. 797.

2. Petitioner further contends that the Selective Service boards "improperly abdicated" their functions to the theological panel and permitted it to "determine the basic issue" (Pet. 38–39).

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[13] Petitioner urges (Pet. 40–43) that the trial court erred in receiving in evidence the materials which the local board received after petitioner was classified I–A by the appeal board. His argument is that under Section 626.2 of the Selective Service Regulations, *infra,* p. 28, the local board lacked power to reopen his classification (Pet. 2, 12, 43) since the additional proof furnished no basis for reclassifying him. We submit, however, that the local board was entitled to review the petitioner's Selective Service file together with the additional materials which it received after petitioner was classified, to determine whether there was any occasion for reopening his classification. The board having done so, the materials which it considered were relevant to the issue whether petitioner had been arbitrarily classified by the Selective Service System.

Since under the Selective Training and Service Act, the Selective Service System is authorized to avail itself of voluntary services to aid it in the administration of the Act (*infra,* p. 26) and since the theological panel acted only in an advisory capacity (*infra,* p. 21), it is plain that petitioner's contention is wholly without merit.

The testimony of Colonel Durham, Chief of the Legal Division of the New York City Headquarters, at the trial, plainly reveals the legal basis and the practical necessity for the establishment of the theological panel (R. 54–56):

> The Selective Service regulations provide that the administration of the Selective Service Law shall be under the supervision of a national director, called the Director, and that in each state the Governor shall be the responsibility for administering the law. Furthermore, that the Governor may delegate his authority to a State Director, and in the case of New York City, there is a special provision which has created New York City as a separate, well, we might say a 49th state, with the same authority and powers as the state organizations, so that the New York City Director, who is Colonel McDermott, has all of the authority and all of the responsibility and the powers that a State Director has, and under that authority there is delegated to him all the authority that the Governor has for the administration of the Selective Service law. It is under

that authority that we organized this Panel about a year and a half ago.

The COURT: What is this Panel, Colonel?

The WITNESS: We found that in respect to theological classifications, the Local Boards were not equipped to handle the necessary investigations, nor did they have the special knowledge that was required to determine many of these difficult theological questions. In the early days that was not much of a problem, because the classifications were all made on the basis of the information in the questionnaire, and in Series 8 of every questionnaire there are three or four questions, and one of them is: "Are you a theological or Divinity student preparing for the ministry, and if so, of what institution, or are you a regular minister of religion and are you an ordained minister of religion, and if so, when were you ordained?"

Those were the simple questions, and that is all the information that the Boards had.

Well, as I say, in the early days when there were plenty of registrants, it was not a problem. The Boards could classify on the basis of that information. In the latter part of 1942 we began to review—the Local Boards began to review those classifications and others, and more and more they came to headquarters to help them with problems. Those all came to me as one of the headaches of the Legal Division. And we had several conferences about it, and

> finally decided that the sensible thing to do was to get together a group of men who might be considered experts, just as we use them in the medical field and in the occupational field and in the case of conscientious objectors. We have hearing officers who have the authority to hold hearings and question the registrant and find out and make a report and recommendation. So we did the same thing in the theological field. And we now have two such—we call it a panel—but they are divided into sections. We have the Panel before whom this registrant came and was questioned. We have another panel that deals more with the cases of Protestants, the various denominations of what might be called the Protestant group; and we have in process of organization a third group, which will have to deal with the Catholic situation, although that is simpler than either of the others, because in the Catholic Church everything is so highly organized, you can pretty well put your finger on the answers.

Colonel Durham further testified that each member of the theological panel signed an oath of office and a waiver of pay, as required by the Selective Service Regulations (*infra,* p. 27) (R. 57–58), and that the panel "renders an advisory opinion which may or may not be followed" (R. 57).

It is undisputed in this case that the conclusion of the panel which interrogated petitioner and

the transcript of that examination were placed in petitioner's selective service file, and that both were considered by the board of appeal in finally classifying petitioner I–A, and by the local board in its informal review of petitioner's classification thereafter. There is likewise no question that both boards were fully aware of the advisory nature of the panel's recommendation. In these circumstances the advice of the panel is in the same category as the recommendation of Rabbi Leiter (*supra*, p. 5), upon which petitioner relies (Pet. 3, 27, 29). Rather than prejudicing petitioner, the use of experts to aid the boards in determining the technical religious question whether petitioner was a duly ordained practicing rabbi insured to him an imartial determination by persons of his own religious faith, who were eminently qualified to pass on the question presented by his claim to exemption as a minister of religion. In short, the theological panel performed the same function that an expert witness performs in the trial of any law suit and which petitioner's expert witnesses performed in this case (see Pet. 8, 29–30).

3. Finally, petitioner contends (Pet. 23–24) that he was entitled to exemption from military service as an ordained minister of religion, even though he does not customarily perform the duties of a rabbi. As we shall show, the Selective Service Regulations expressly provide to the contrary,

and they are consistent with the congressional purpose underlying Section 5 (d) of the Act, which provides:

> Regular or duly ordained ministers of religion * * * shall be exempt from training and service (but not from registration) under this Act.

In accordance with this provision, Selective Service Regulation 622.44 (*infra*, p. 27) provides that a regular minister of religion or a duly ordained minister of religion shall be classified IV–D, the classification which petitioner sought. The regulation further provides, however, that "a duly ordained minister of religion is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; *and who customarily performs those duties.*" [Italics supplied.]

It is petitioner's view that there is no support in the Act for the requirement of the regulation that to be entitled to an exemption a duly ordained minister must also be a practicing minister. We submit, to the contrary, that in Section 5 (d) the Congress intended to adhere to the same exemption from military service which was provided in the first World War. Thus, the pertinent language of Section 5 (d) is identical to

that in Section 4 of the Selective Draft Act of 1917 (50 U. S. C., App. 204). And, likewise, the 1917 Selective Service Regulations provided in Section 79 (*infra*, p. 29) that a duly ordained minister within the meaning of the Act was one who not only was ordained as such but who practiced as a minister of religion. Resort to the discussions on the floor of the Senate of the amendment which became Section 5 (d) of the Act, shows beyond any doubt that it was intended that the exemption granted by the 1917 Act and regulations should be granted by the 1940 Act (86 Cong. Rec. 10500–10503). Thus, in explaining the present provision, Senator Walsh stated on the floor of the Senate (86 Cong. Rec. 10502):

> * * * So far as I am concerned and so far as the representatives of religion who have conferred with me are concerned, we are very strongly of the opinion that the amendment should have no loopholes in it, and that only ministers of the gospel and actual students who are engaged in giving all their time in preparation for religious work should be exempted.
>
> The regulations of the War Department which were promulgated in 1917 were in every way satisfactory to these religious groups; and I think the Senator from Colorado, in drafting his amendment, had in mind the language that was used in the law of 1917 and had in mind the expecta-

> tions that the War Department would promulgate the same regulations if the pending bill should be enacted.
>
> As I understand, there was in the committee unanimity of opinion in favor of exempting actual ministers of the gospel who are actually performing ministerial and religious duties.

Thus, we submit that Selective Service Regulation 626.44 is a valid interpretation of the congressional intent that, as in 1917, only ministers of religion who actually function as such should be exempted from military service. The Congress, it is clear, did not intend that a mere ordination certificate should of itself entitle a registrant to exemption from military service. We agree with the court below (R. 189) that Section 5 (d) is "more a recognition of the public need for spiritual guidance than a mere individual privilege."

Respectfully submitted.

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DECEMBER 1944.

APPENDIX

The Selective Training and Service Act of 1940 (54 Stat. 885, 50 U. S. C. App. 301, *et seq.*) provides, in part, as follows:

> SEC. 5. * * * (d) Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act.
>
> * * * * *
>
> SEC. 10. * * * (b) The President is further authorized, under such rules and regulations as he may prescribe, to delegate and provide for the delegation of any authority vested in him under this Act to such officers, agents, or persons as he may designate or appoint for such purpose or as may be designated or appointed for such purpose pursuant to such rules and regulations as he may prescribe.
>
> (c) In the administration of this Act voluntary services may be accepted. * * *

The Selective Service Regulations provide:

> 602.2 *Voluntary services.* Voluntary services in the administration of the selective service law may be accepted and should be encouraged.
>
> 602.3 *Uncompensated services.* The services of registrars, members of local boards, members of boards of appeal, members of medical advisory boards, members and associate members of advisory boards

for registrants, government appeal agents and associate government appeal agents, examining physicians and examining dentists, reemployment committeemen, interpreters, and all other persons volunteering their services to assist in the administration of the selective service law shall be uncompensated, and no such person shall accept remuneration from any source for services rendered in connection with selective service matters.

602.4 *Oath of Office and Waiver of Pay or Compensation (Form 21).* (a) Every person who undertakes to render voluntary uncompensated service in the administration of the selective service law shall, before he enters upon his duties, execute an Oath of Office and Waiver of Pay or Compensation (Form 21).

(b) Every person who undertakes to render compensated service in the administration of the selective service law shall, before he enters upon his duties, execute the Oath of Office portion of Form 21, but shall not execute the Waiver of Pay or Compensation portion of Form 21.

(c) When executed in the manner hereinabove provided, the Oath of Office and Waiver of Pay or Compensation (Form 21) shall be sent to the State Director of Selective Service for filing.

* * * * *

622.44 Class IV–D: Minister of religion or divinity student.

(a) In Class IV–D shall be placed any registrant who is a regular or duly ordained minister of religion, or who is a student preparing for the ministry in a theological or divinity school which has been recognized as such for more than one year prior to the

date of enactment of the Selective Training and Service Act (September 16, 1940).

(b) A "regular minister of religion" is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister.

(c) A "duly ordained minister of religion" is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties.

* * * * *

626.2 *When registrant's classification may be reopened and considered anew.* (a) The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any interested party in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an

Order to Report for Induction (Form 150) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

(b) At any time before the induction of a registrant, the local board shall reopen and consider anew such registrant's classification upon the written request of the State Director of Selective Service or the Director of Selective Service.

* * * * *

627.1 *Who may appeal any determination of a local board to a board of appeal at any time.* (a) Either the State Director of Selective Service or the Director of Selective Service may appeal from any determination of a local board.

(b) Either the State Director of Selective Service or the Director of Selective Service may take such an appeal at any time.

* * * * *

627.24. *Review by board of appeal.* (a) The board of appeal shall consider appeals in the order in which they are received.

(b) In reviewing the appeal, no information shall be considered which is not contained in the record received from the local board and the decision of the board of appeal shall be based solely thereon.

Section 79 of the 1917 Selective Service Regulations provided in part:

In Class V shall be placed any registrant found to be—

* * * * *

(b) A regular or duly ordained minister of religion.

* * * * *

NOTE.—A duly ordained minister of religion is a person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.

A regular minister of religion is one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

The words "regular or duly ordained minister of religion" do not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization, nor do the words include a person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect, or organization, but who does not regularly, as a vocation, preach and teach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization.

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IN THE

Supreme Court of the United States

October Term 1944

No. 694

ISAAC TRAININ,

Petitioner,

against

DAVID E. CAIN, Commanding Officer of Camp Upton.

PETITIONER'S REPLY BRIEF

OSMOND K. FRAENKEL,
Counsel for Petitioner.

IN THE

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PETITIONER'S REPLY BRIEF

Respondent's brief contains various misconceptions of petitioner's contentions, inaccurate statements and unsound arguments that require brief consideration.

1. Respondent recognizes (Brief p. 14) the importance of the question of the scope of judicial re iew in a habeas corpus proceeding such as this and that this Court has never passed on the point. Respondent suggests, however, that the correct rule was stated in *Ex parte Stanziale*, 138 F. (2d) 312, a decision which this Court refused to review (320 U. S. 797). There the Circuit Court of Appeals for the Third Circuit expressed the opinion that the courts could not at all examine the evidence considered by a draft board, but could determine only if the registrant had been afforded an opportunity to present his case. We cannot believe that this restricted view of the rights of registrants can meet with the approval of this Court. Under such a doctrine a draft board could flout the law by simply listening to a registrant and then, without any substantial

basis for so doing, disregard all his proof and arbitrarily reject his claim for exemption.

The *Stanziale* case, however, presented a different problem from the case at bar, for in that case there was no right to exemption because of dependents, not even an absolute right to deferment. Regardless, therefore, of the character of the evidence on the issue of dependents there were other considerations which might have justified the Draft Board action in that case, considerations with which the courts could have no concern in the absence of a showing of discrimination. But in the case at bar petitioner was entitled to complete exemption if he was a rabbi. That exemption had been twice granted him; it could not be taken away except on the basis of substantial proof. That there was no such substantial proof contrary to his claims we have already demonstrated in our main brief. The issue of the scope of judicial review is, therefore, necessarily presented in this case.

2. It is difficult to understand the reference (Brief p. 16) to credibility in connection with the issue of petitioner's ordination. No one ever suggested that the certificates of ordination had not been given by the rabbis whose names they bore—indeed two of the three were among the rabbis who vouched for petitioner before Mr. Goldman in December, 1943 (R. 116, 122). Nor did anyone ever question the right of these rabbis to ordain petitioner (see R. 37, 38, 43). The only other aspect of this issue was the sufficiency of the certificates. And that also involved no issue of credibility. For there was no evidence whatever before the Draft Board to challenge the statement of the rabbi of its own choice that these certificates were proper ones (R. 38).

Respondent (pp. 4, 5) suggests that there was evidence before the Draft Board that it was usual for certificates of ordination to contain certain words. But this is not the fact. The record references given in respondent's brief

(R. 98, 101) are not to anything in the draft file or to any witness who appeared before the Board. The references are to the testimony of Rabbi Goldstein before Judge Inch —and even his testimony does not justify the conclusion that the certificates were not in the form required by Hebrew law.

This question of the form of the certificates is repeated (p. 17) by the statement that the panel inquiry showed that the certificates were not "in the customary form". But that inquiry showed no such thing. It developed only the fact that the certificates did not contain certain words. There is absolutely nothing in the panel minutes (R. 125-140) to show that these, or any other words, were necessary, or indeed customary. While it is true that the panel made a rather vague statement on this subject (R. 21), this statement was not known to the Draft Board when it reclassified petitioner (R. 32) and was never seen by the Appeal Board (R. 61, 62). So if, as respondent argues (Brief p. 14), it is the record before the Appeal Board which is decisive then the reasons given by the panel for rejecting petitioner's claim must be disregarded.

Consequently there is no foundation to the claim that the Draft Board had evidence from which it could disregard the statements of all the rabbis who appeared before it that petitioner had been duly ordained. There was no room for any question of credibility whatever.

3. Respondent's brief falls into the same error as did Rabbi Goldstein in casting doubt upon petitioner's performance of functions by referring to the fact that persons not ordained as rabbis might perform some of these functions (Brief p. 17, R. 107). That can have nothing to do with the case at all. The crucial fact is that petitioner claimed that he had functioned for some years as the rabbi of a congregation located within a mile of the Local Board's office, that his claim was accepted even after the receipt of a complaint in 1942 (R. 65, 66) and then was rejected arbitrarily, without any attempt to inquire into the facts.

Such administrative action cannot be defended by the argument that the Board did not believe petitioner. It believed him in 1942; it could not arbitrarily change its position in 1943. Indeed it is probable that petitioner was not reclassified on that score; for Mr. Goldman admitted that petitioner was functioning (R. 42) and the emphasis before the Local Board was entirely upon the issue of ordination.

Respondent's brief twice refers (R. 11, 17) to certain testimony before the panel as indicating that petitioner had not functioned as a rabbi. The references are to a statement volunteered by petitioner with regard to his efforts to enlist as a chaplain (R. 126). It is evident, however, that this statement was not correctly reported. For petitioner denied that he had said this (R. 66, 67), and that testimony was given prior to the time that Rabbi Goldstein testified. Yet the rabbi, who had been present at the panel hearing (R. 97), did not contradict petitioner. Surely no use can properly be made of this erroneous reporting.

4. Respondent entirely misconceives (note 13, p. 18) the basis of petitioner's objection to the receipt in evidence of the three documents not seen by the Appeal Board at all and not seen by the Local Board until the eve of petitioner's actual induction. Petitioner's argument is not that the additional proof furnished no basis for a reclassification. He claims that any further consideration of petitioner's status after he had been ordered to report for induction was in plain violation of the regulations (§ 626.2) and that it constituted a denial of due process since petitioner was not advised of the Board's action or given any opportunity to be heard. Respondent has in no way met these contentions.

5. Respondent also (pp. 18-22) misconceives petitioner's objection to the functioning of the panel. Respondent (p. 22) says that the panel performed the same function as an expert witness performs in a law suit. But that is

just what the panel did not do. The expert is cross-examined by the party—here the party was cross-examined by the so-called expert. Respondent's analogy is not a happy one.

Petitioner recognizes the right of the Selective Service System to avail itself of voluntary services and of expert advice. We insist, however, that this was not done in the case at bar. At the risk of repetition we point out that this panel was never called on to express any expert opinion on those points on which its views might have had value, namely, the right of one rabbi to ordain another, or the form of the ordination certificates. Moreover, even if this had been done there would still have been a denial of due process here since petitioner was never informed that any such opinion had been rendered or given an opportunity to meet it. There is nothing in the long quotation from Col. Durham's testimony (Brief pp. 19-21) which touches on this basic problem at all. The denial of due process was flagrant and should not be allowed to pass.

Respectfully submitted,

Osmond K. Fraenkel,
Counsel for Petitioner.

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IN THE

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No. 694

ISAAC TRAININ,

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PETITION FOR REHEARING

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ISAAC TRAININ,

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PETITION FOR REHEARING

To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

1. Petitioner's application for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit was denied by this Court on January 8, 1945.

2. Among the grounds on which that application was based was the question of the quantum of proof necessary to justify action by a draft board. The Circuit Court held that such action must be upheld if based on "any" evidence, expressly recognizing that other Circuits had applied to draft board orders the "substantial evidence" rule by which administrative action is generally tested. This Court is now being asked, in *Bridges* v. *Wixon*, No. 788 of this Term, to consider the quantum of proof properly applicable to deportation proceedings. In view of the fact that the Circuit Court in the case at bar rested its decision in large part on its belief that the substantial evidence rule was not applicable to deportation proceedings, petitioner respectfully urges that, if this Court grant the application

for a writ in the *Bridges* case, it reconsider its denial of the application in the case at bar, so that the question of the proper quantum of proof be considered by it with regard to draft cases as well as deportation proceedings.

3. Petitioner had grounded his application also on denials of due process by the draft board and the courts below. Two such denials are so destructive of orderly administrative and judicial processes that petitioner can hardly believe that this Court means to condone them. And if they are not to be condoned they should be rebuked and petitioner given a new administrative hearing free from taint.

Petitioner refers first to the use of the panel as "expert" witnesses against him when the panel expressed no opinion to the draft board on the technical issues in the case and the opinion which it did express was not made known to petitioner—and was, indeed, not known to the draft board when it reclassified petitioner and was never known to the appeals board. Petitioner refers also to the use in evidence against him in the District Court of this so-called opinion of the panel and of two other documents, none of which were before the draft board when it reclassified petitioner, none of which were ever seen by the appeals board. It is inconceivable that an American court should uphold administrative findings on the basis of evidence not considered by the administrative agency and sanction a deprivation of liberty on the basis of evidence which the person affected had no opportunity to meet. Yet unless this Court reconsider its previous action and grant the application for rehearing this will have been accomplished.

WHEREFORE, petitioner respectfully asks for a rehearing of the application for certiorari herein, which counsel certifies is presented in good faith and not for delay.

January 19, 1945.

OSMOND K. FRAENKEL,
Counsel for Petitioner.